83-378

NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BIG SPRING INDEPENDENT SCHOOL DISTRICT
EMMETT McKENZIE, JIM W. LITTLE
DELNOR POSS, ROY WATKINS, AL VALDES,
DELBERT DONELSON, DON REYNOLDS
CAROL HUNTER, JOHN SMITH, AND DON ROBBINS

Petitioners

VS.

JAMES GRIFFEN

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

(with appendixes attached)

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QUESTIONS PRESENTED

1. In an alleged discrimination-teacher reemployment case, does the statute of limitations begin to run when the School Board's decision to not re-employ is made and notice of same given, or when a hearing for re-consideration of such non-re-employment decision is determined adversely to the employee?

2. Whether an appeal from a decision of the Texas State Board of Education to the State District Court is the "same action" as a suit filed in United States District Court alleging violation of civil rights under 42 U.S.C. §1981, 1983, and 1985, within the meaning of the Texas tolling statute?

3. Whether the Texas State Board of Education can overrule a decision of the Commissioner of Education based on the written transcript of hearing and briefs, and the parties to such proceeding be collaterally estopped from relitigating such factual issues in Federal Court?

TABLE OF CONTENTS

Questions Presented for Review..... i

Table of Contents..... ii

Table of Authorities.....iii

Introduction..... 1

Opinions Below..... 1

Jurisdiction..... 1

Constitutional and Statutory Provisions Involved..... 2

Statement of the Case..... 3

Argument..... 13

Conclusion..... 53

Appendix A.....A-1

Appendix B.....B-1

Appendix C.....C-1

Appendix D.....D-1

TABLE OF AUTHORITIES

Cases

Chalmers v. American National Insurance Company, 103 S.W. 2d 288 (Tex. Civ. App. - El Paso 1937 no writ).....38

Chardon V. Fernandez, 454 U.S. 6, 102 S.Ct.28, 70 L.Ed.2d 6 (1981).....16

Delaware State College v. Ricks, 449, U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980).....13,15,16,23,32

Garrett v. Hartford Accident & Indemnity Company, 107 S.W. 2d 726 (Tex. Civ. App. - Eastland 1937 no writ).....35

International Union of Electrical Workers v. Robbins & Meyers, Inc., 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed. 2d 427 (1976).....28

Missouri Pacific Railroad Co. v. Duncan, 353 S.W.2d 315 (Tex. Civ. App. - Austin 1962 no writ).....48

Nasem v. Brown, 595 F.2d 801 (D.C. Cir. 1979).....44

Oram v. General American Oil Company of Texas, 503 S.W. 2d 697 (Tex. Civ. App. - Eastland 1973, writ ref. n.r.e.).....37

Painters District Council N. 38 v. Edgewood Construction Co., 416 F.2d 1081 (5th Cir. 1969).....44,46,52

Prudential Insurance Company of America v. Schreffler, 376 F.2d 397 (5th Cir.1967) cert. denied 389 U.S. 1005.....48

United States v. United States Gypsum Co., 333 U.S. 364 68 S.Ct. 525, 92 L.Ed. 746 (1948).....47

United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S.Ct. 1545, L.Ed.2d 642 (1966).....42,45,46,52

Statutes

Fourteenth Amendment to the United States Constitution

28 U.S.C. §§ 1331, 1332.....35

42 U.S.C. §1981.....33,34

42 U.S.C. §1983.....33,34

42 U.S.C. §1985.....33,34

Tex. Rev. Civ. Stat. Ann. art. 5526.....12,17

Tex. Rev. Civ. Stat. Ann. art. 5539a.....33,39

Tex. Rev. Civ. Stat. Ann. art. 6252-13(a).....11,34,35,41,48

INTRODUCTION

Writ of Certiorari is respectifully sought by petitioners to review the decision of the Court of Appeals for the Fifth Circuit holding that respondent was not barred from prosecuting his case by the Texas statute of limitations and was not collaterally estopped from relitigating by virtue of the findings of the Texas State Board of Education.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B, infra, page B-1) is not yet reported. The opinion of the District Court for the Northern District of Texas (Appendix B, infra, page B-38) is not reported.

JURISDICTION

This writ is sought to review a judgment of the Court of Appeals for the Fifth Circuit dated June 9, 1983, and

entered on that date.

This Honorable Court has jurisdiction to review the judgment in question by virtue of Article 28 USC Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the following listed constitutional provisions and statutes, all of which are set forth in pertinent part in Appendix A, to wit:

The United States Constitution, Fourteenth Amendment

42 U.S.C. §1981

42 U.S.C. §1983

42 U.S.C. §1985

Tex. Civ. Stat. Ann. Art. 5526

Tex. Civ. Stat. Ann. Art. 5539a

Tex. Civ. Stat. Ann. Art. 6252-13a, §16e and §19(a) and (b)(1)

STATEMENT OF THE CASE

STATEMENT OF THE PROCEEDINGS

On June 9, 1979, Respondent, a black teacher/coach who had been employed by the Big Spring Independent School District, filed this action in the United States District Court for the Northern District of Texas (Abilene Division) alleging racial discrimination in non-employment in violation of his rights under the Fourteenth Amendment to the United States Constitution. The Complaint sought reinstatement, lost wages, and other damages, and injunctive relief.

The District Court, the Honorable Halbert O. Woodward presiding, began a non-jury trial of the matter on August 15, 1980. The Court recessed the trial and heard argument on Petitioners' Motion for Summary Judgment. On September 8, 1980, the District Court entered an opinion which concluded that Respondent's suit was barred by the applicable

statute of limitations and that litigation of his claim was collaterally estopped by a prior finding by the Texas State Board of Education that the non-renewal of Respondent's employment contract was not discriminatorily motivated. By Order of the same date, the Court entered Judgment dismissing the case.

On timely appeal, the Court of Appeals for the Fifth Circuit, on June 9, 1983, rendered its opinion reversing the decision of the District Court and remanding the case for further proceedings.

This Petition for Writ of Certiorari is timely filed.

STATEMENT OF FACTS

Respondent was first employed as a high school teacher/coach by the Big Spring School District for the school

year 1973-74. The Big Spring School District employs teaching personnel only on one-year contracts. Respondent was given another one-year contract for the year 1974-1975, again for 1975-1976, and finally 1976-1977. Respondent makes no claim that he was entitled to or had any reasonable expectation of tenure and such an issue is not here involved. Likewise, this case does not involve any claim by respondent that he was denied any Fourteenth Amendment due process rights or claims of inadequacies of hearing. Respondent's last employment contract was for a term beginning August 2, 1976, and ending May 27, 1977.

As was the custom of the School Board, in March of 1977, they considered contract renewals for all of the District's teachers since they were the ultimate body responsible for hiring

decisions. In accordance with the recommendation of Principal and Assistant Principal that the Board's action on respondent's contract be withheld pending further evaluation and consideration, the Board did so withhold action. On or about May 6, 1977, following further observation of respondent by appropriate school personnel, the high school Principal recommended to the Superintendent that respondent not be employed for the following school year. The respondent met in conference with the Superintendent concerning the recommendation.

On May 12, 1977, the Board of Trustees met in regular session and accepted the recommendation of Superintendent Emmett McKenzie and decided not to again employ respondent for the 1977-1978 school year. On May 13, 1977, Respondent was notified by letter of the

Board's decision. Respondent admitted on deposition that at that point in time, when he received the said letter, he knew that for all practical purposes he did not have a job with the District the following year. In accordance with the Board's grievance procedures Policy No. 9510 governing appeals, the Board granted respondent the opportunity to appear before the Board to urge a reconsideration of their earlier decision.

On June 9, 1977, the Board held a hearing. On June 9, 1977, following the appeals hearing and executive session, the Board reconvened in a public hearing, but there was no motion by any member to offer to respondent another one-year contract. The respondent's contract therefore expired by its own terms on May 27, 1977. Thereafter, a black person was employed by the District as a teacher

and as a coach, though not at a high school varsity level.

Respondent appealed the Board's action to the Texas Education Agency, and it conducted a two-day hearing which produced a record of 408 pages, involving nine witnesses and 23 exhibits. The hearing officer made recommendations which were adopted by the Commissioner and which decision was in favor of the respondent. Upon appeal to the full State Board of Education with a full transcript of the record, the Commissioner's decision was reversed. As a part of the appeals process from Commissioner to State Board of Education, both the "appellant school district" and "appellee teacher" were permitted to submit briefs to the full Board. On December 12, 1978, the School District filed an original and 25 copies of a brief, an

adequate number for each member of the Board. Respondent's attorney did not file a brief with the Board. Of course, the full record and transcription of the testimony of the hearing was on file with the State Board and available to each member of the State Board of Education, same constituting 24 members.

The matter was scheduled for announcement of decision by the Board on January 13, 1979, and some few days prior thereto, an attorney with the Texas Education Agency requested petitioners' counsel to submit what the District thought to be proper proposed or suggested findings in the case. Of course, in response to such request, petitioners' counsel did prepare proposed findings. In accordance with its rules, the State Board of Education did not take any additional testimony, just as

this Honorable Court does not in an appellate matter from a lower Court nor in appeals from administrative bodies. The State Board on January 13, 1979, issued its Order reversing the Commissioner's decision and ruling that the action of the School District in not offering to employ respondent for another one-year term was not discriminatorily motivated. Again, in accordance with the State Board's rules, no oral argument from either side was heard by the Board. There is nothing in the record or otherwise to indicate any improper action or motivation by the District's counsel or members of the State Board.

Following the issuance of the order by the State Board of Education, respondent failed to follow the administrative remedies prescribed by statute (TEX,REV.

CIV. STAT. ANN. art. 6252-13(a), §§16(e), 19(b)(1), and failed to file his Motion for Rehearing. Thereafter, respondent filed a petition with the District Court of Travis County, Texas, asking for a review of the State Board's decision. Respondent's case was dismissed for his failure to file a motion for rehearing before the State Board, a jurisdictional prerequisite under the above cited statutes.

The decision of the District Court held that the respondent's cause of action accrued no later than May 13, 1977, the date of notification to respondent that he would not be re-employed and therefore this cause, filed June 8, 1979, being more than two years after the date of the School Board's action (May 12, 1977) and notification (May 13, 1977), was barred by the now admittedly

applicable two-year statute of limitations, TEX. REV. CIV. STAT. ANN. art. 5526.

Respondent never asserted before the trial court that the Board's June 9, 1977, refusal to renew respondent's contract was an "independent actionable event" as was apparently held by the Court of Appeals. It was the respondent's position in the trial court, since abandoned, that his cause of action did not accrue until he had missed a paycheck, which would have been some time in August of 1977. Respondent did contend in his Response to Petitioner's Motion for Summary Judgment that, under several theories, June 9, 1977, was the applicable date, but in none of those theories was it urged that the events of June 9, 1977, were an independent actionable event.

The Court of Appeals for the Fifth Circuit reversed the decision of the District Court and remanded the case for further proceedings.

ARGUMENT WHY CERTIORARI SHOULD BE GRANTED

A. The opinion below conflicts with this Court's decision in Delaware State College v. Ricks, 440 U.S. 250,101 S.Ct 498, 66 L.Ed2d 431 (1980) in holding that the limitations period did not begin when the decision to not re-employ respondent was made, but rather began the time of the reconsideration hearing.

B. The opinion below erroneously construes Texas Statute Article 5539a in holding that this suit is the "same action" as a judicial appeal of the decision of the State Board of Education, and, if left undisturbed, incorrectly states the law of the State of Texas.

C. The opinion below in effect unduly restricts the authority of the Texas State Board of Education to overrule a decision of the Commissioner of Education.

Petitioners contend that the District Court correctly dismissed this suit on two grounds: (1) limitations, and (2) collateral estoppel, either of which grounds is sufficient and adequate to sustain the judgment of the District Court.

Respondent's claim was barred by the applicable two-year statute of limitations.

Respondent did not allege, nor contend until the appeal, that the reconsideration hearing of the School Board on June 9, 1977, constituted an independent cause of action, separate and apart from the Board's decision to not again employ respondent made at its May 12, 1977

meeting. This Supreme Court in the Ricks case, infra, has determined that, in a case such as this, the limitations period began when the Board's decision was made on May 12, 1977, and therefore, this suit, filed more than two years thereafter, is barred.

The Honorable Court of Appeals held that this action of the Board of Trustees on June 9, was a separate and independent event. As pointed out, the Complaint alleged that on June 9 the Board "voted not to renew Plaintiff's contract to teach in the District." As demonstrated this is factually inaccurate in that the decision not to renew was made on May 12, and the events that took place on June 9 were merely an absence by the Board to reverse its previous decision. The opinion of the Court of Appeals conflicts with the Ricks case in holding

that the failure of the Board to reverse itself could be considered as an independent event, contrary to the reasoning of the Supreme Court in Delaware State College v. Ricks, 449 U.S.250, 66 L.Ed 431, 101 S.Ct. 498 (1980), insofar as limitations are concerned. Also, the opinion below is contrary to the opinion of this Honorable Court in Chardon v. Fernandez, 454 US6, 70 L.Ed.2d 6, 102 S.Ct.28 (1981) which held that the applicable limitations period began to run when the Complainants, who were nontenured administrators in Puerto Rico, who were notified that they would be terminated at a particular date in the future. The contention was that the termination date was the accrual date insofar as limitations is concerned. As stated by this Court in Chardon:

"In Ricks, we held that the proper focus is on the time of the discriminaory act, not the point of which the consequences of the act become painful. Id, at 258, 66 L.Ed.2d 431, 101 S.Ct. 498."

The original complaint herein was filed on June 8, 1979, alleging the petitioners had impermissibly discriminated against Plaintiff in violation of his rights under 42 U.S.C. §§1981, 1983, and 1985 and the Fourteenth Amendment to the Constitution. Respondent concedes the correctness of the District Court's ruling that the two-year statute of limitations provided by the State of Texas in Art. 5526, TEX. REV. CIV. STAT. ANN. is the applicable limitations statute. In response to respondent's argument concerning the date of the accrual of the cause of action, petitioners would urge as follows:

The decision of the School District not to offer respondent another one-year

contract of employment was made on May 12, 1977, (and respondent so notified in writing on May 13, 1977), and that was the act constituting the gravamen of respondent's action, if any discrimination occurred, which is denied. The grievance procedure hearing on June 9, 1977, initiated by the respondent's ask- for a reconsideration by the School Board of its May 12 decision was not, and was not alleged to be, a distinct and independent act of discrimination, separate and apart from the School Board decision and action on May 12. Since this suit was brought more than two years after the petitioner's decision not to employ the respondent for another year, the action is barred by the statute of limitations. Respondent alleged, in paragraph 2 of the complaint:

> Specifically, respondent alleges that the Petitioners have termi-

nated his employment as a teacher because of respondent's race, black.

And in a subsequent paragraph alleged:

> On June 9, 1977, the Board of Trustees of the Big Spring Independent School District voted not to renew respondent's contract to teach in the District.

The undisputed facts, as admitted and stipulated by all parties prove this allegation to be incorrect, i.e., June 9 was not when the District failed to renew respondent's contract; his contract was not renewed on May 12, 1977.

The following chronological sequence of events is undisputed and admitted; and is a proper part of the record on the Motion for Summary Judgment as found by the Honorable District Court.

1. Respondent had, and was aware that he only had, a one-year employment contract with the school District which expired by its own term on May 27, 1977.

2. On or about February 15, 1977,

a conference was had between the respondent and his principal and assistant principal wherein respondent's performance as a teacher was discussed and the results of such conference subsequently reduced to written recommendation dated February 25, 1977, wherein a final recommendation as to the respondent's employment was deferred.

3. Respondent was not recommended for another contract of employment at the School Board meeting of March 10, 1977, but Board action was then deferred for further evaluation of respondent Griffin.

4. On May 6, 1977, respondent had a conference with his principal, as well as the athletic director, after which conference the written recommendation of same date was made to the superintendent that Griffin not be employed for the 1977-78 school year, and which written recommendation was signed by the respondent.

5. On May 11, 1977, the respondent and the Superintendent had a conference, at respondent's request, the report of which conference was sent to the Board of Trustees and to Griffin.

6. Respondent, following the conference with the Superintendent and knowing that the Principal's recommendation of "no new contract"

was to be considered by the School Board, did not attend the May 12, 1977 Board meeting.

7. At its May 12, 1977 meeting the School Board accepted the recommendation of the Superintendent and decided not to again employ respondent for the 1977-78 school year.

8. Respondent received written notice of the Board's decision to not offer him an extension of his contract on or about May 13, 1977.

9. Respondent knew at that time (May 13, 1977), that he had no job with the School District the following year.

10. Respondent's contract expired by its own terms on May 27, 1977.

It is Petitioner's position that if there were any impermissible discriminatory action taken, it was when the decision of the School Board was made to not rehire respondent and he had been informed of such decision.

As shown by the Admissions and Stipulations of Fact contained in the Pretrial Order, it was on May 12, 1977,

that the Board of Trustees "decided not to again employ respondent" (emphasis added). It is apparent, therefore, from such undisputed evidence and admissions and stipulations (regardless of allegations contained in the complaint) that it was on May 12, 1977, that the decision was made.

In accordance with the School Board's grievance policy No. 9510, plaintiff requested, sought, and obtained a hearing before the School Board, seeking reconsideration by the Board of its said decision made on May 12, 1977. At that hearing, which was conducted on June 9, 1977, it was stipulated that:

> "The Board of Trustees took no action to change its decision of May 12, 1977, which was not to extend to respondent a contract to teach in the District for 1977-78 school year." (emphasis added)

The uncontroverted affidavits attached to petitioner's Motion for

Summary Judgment, along with the sworn copies of the School Board minutes, show the respondent's contract of employment was not renewed on May 12, 1977. Respondent has testified that on or about May 13, 1977, he had received the letter of notification and knew he did not have a job with the School District for the following school year.

In Ricks, the Supreme Court considered the various possible dates when the limitation period commenced. The plaintiff contended for June 30, 1977, the final date of his "terminal contract." The Supreme Court rejected this date.

The EEOC, in its Amicus Brief, contended that the critical date was September 12, 1974, when the Board notified Ricks that his grievance had been denied. This date is comparable to our June 9, 1977, date when the peti-

tioner School Board rejected respondent Griffin's grievance appeal. The Supreme Court, in rejecting the September 12, 1974 date, held that the critical date was June 26, 1974, when the plaintiff was notified of the College's decision of "no tenure." As stated by this Honorable Supreme Court (p. 505-506):

> "But entertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a remedy for a prior decision before it is made. (italics by the Court)
>
> As to the latter argument, we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of limitations period. International Union of Electrical Workers vs. Robbins & Myers, Inc. 429 U.S. 229, 97 Supreme Ct. 441, 50 L. Ed. 2d 427 (1976). The existence of careful procedures to assure fairness in the tenure decision should not obscure

> the principle that limitations periods normally commence when the employer's decision is made." (emphasis added)

This Supreme Court affirmed the decision that the appropriate commencement date for the limitations period was the date of the letter (June 24, 1974) from the Board to the teacher notifying him that he would be terminated on June 30, 1975. This letter is analogous in the case at bar to the above-described letter of May 13, 1977, to respondent Griffin notifying respondent of the non-renewal of his contract, and that his contract would expire May 27, 1977. As subsequently stated by this Supreme Court in its note (p.506, fn. 15);

> "We do not suggest that aspirants for academic tenure should ignore available opportunities to request reconsideration. Mere requests to reconsider, however, cannot extend the limitations periods applicable to civil rights laws." (emphasis added)

Clearly under the holding and reasoning of the Ricks opinion, in the case at bar, the final decision of the petitioner School Board was made on May 12, 1977, which was admittedly communicated to respondent on May 13, 1977. Thereafter, the following of the Board's grievance policies affording respondent an opportunity to request reconsideration of its prior decision does not, as held by this Supreme Court, toll the statute nor extend the time period.

The stipulations, admissions and uncontradicted evidence established that the decision of the School Board not to offer respondent another one-year contract was made on May 12, 1977. What actually happened on June 9, 1977, was that the Board heard the respondent's position, but took no action to change or alter its previous decision of May

12, 1977.

Respondent argued, and the Court below held, that his allegation of events occurring on June 9, 1977 is adequate to state a cause of action which accrued on that date, and that Ricks doesn't apply because the plaintiff there did not plead an independent cause of action.

Obviously, in the instant case, the hearing held by the School Board on June 9, 1977, was not "separate and independent" from the Board's action of May 12, 1977, but rather was a grievance procedure asking for reconsideration of such a prior decision to terminate as addressed in the Ricks opinion. Also, it is obvious that respondent here has not alleged (since it would be untrue) that the conduct of the School Board on June 9, 1977, was "separate and independent" from the Board action of May 12, 1977.

In the instant case the hearing that was held on June 9, 1977, was admittedly an appeal from and request for reconsideration of the Board's prior decision of May 12, 1977, clearly a step in the School Board's grievance procedure. Plaintiff has not alleged in his complaint, nor was there any such contention prior to the appeal, that the inaction of the School Board on June 9, 1977, constituted a separate act of discrimination; nor a distinct act of discrimination; nor an independent act of discrimination, different and apart from the Board's May 12 decision. The June 9 hearing was merely an appeal for reconsideration of the May 12 decision.

Almost the precise argument urged by respondent was presented to the United States Supreme Court in International Union of Electrical Workers v.

Robbins & Meyers, Inc. 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed2d 427 (1976). In that case the employee had been discharged on October 25, 1971 (at a time when the Title VII limitation period was 90 days). Two days later the employee filed a grievance under the provisions of the collective-bargaining agreement then in force between her union and the employer. Such procedure consisted of three grievance steps followed by one arbitration step. The employee's grievance was processed through the third step of the grievance procedure where it was denied on November 18, 1971, with a finding favorable to the employer.

On February 10, 1972, eighty-four days after the denial of her grievance at the third stage (November 18, 1971, analogous to the June 9, 1977 date in the instant case at bar), but 108 days

after the date of her discharge (October 25, 1971, analogous to the School Board's decision of May 12, 1977), the employee, who was black filed a charge of racial discrimination with EEOC under Title VII. The employee, and her union, contended that she had met the 90-day filing deadline of Title VII, not because of any tolling concept, but because the date the alleged unlawful employment practice occurred was the date of the conclusion of the collective-bargaining agreements grievance-arbitration procedures (i.e., November 18, 1971). Until that time, the plaintiff urged, her discharge was tentative and non-final, and remained so until she terminated the grievance process, at which time the final occurrence transpired and the discharge became final, therefore, constituting

the "occurrence" within the 90-day time period. This Supreme Court rejected that argument and held that the operative date of discrimination, if any, was the date of employment termination, i.e., October 25, 1971 (comparable to our May 12, 1977 date). This Supreme Court further rejected the tolling arguments of the plaintiff but did hold that the subsequent legislative amendment to Title VII allowing 180 days for filing (rather than 90 days) was operative and gave plaintiff the right to file when she did.

In the case at bar, it is apparent that the Honorable District Court was correct in its holding that respondent's suit was filed after the expiration of the limitation period and in its holding that the respondent's cause of action, if any, accrued no later than May 12,

1977, when the Board's decision not to reemploy respondent was made, rather than the date of any grievance procedure appeal for reconsideration, as pronounced by the Ricks case, supra.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONTRAVENES THE LAW OF THE STATE OF TEXAS, WHICH STATE LAW WAS BEING INTERPRETED, AND THEREFORE, THE FIFTH CIRCUIT DECISION SHOULD BE REVERSED

The statute of limitations was not tolled during the pendency of appeal to the state court. As Griffen correctly acknowledges on page 28 of his Fifth Circuit brief, his complaint in federal district court was filed more than two years after the original May 12, 1977 decision by the School Board.

The State Board of Education handed down its Order on January 13, 1979, sustaining the action of the School District in not employing Griffen for another year.

On the 12th day of February, 1979, Griffen filed his Petition in the 261st District Court of Travis County, Texas, seeking a judicial review of such State Board order. On May 30, 1979, such appeal was dismissed for the reason that Griffen had failed to comply with the statutorily-mandated Motion for Rehearing required to be filed prior to the filing of any suit seeking judicial review. On June 8, 1979, Griffen filed his complaint in the U.S. District Court seeking relief under 42 USC §§1981, 1983, and 1985.

Griffen contended, for the first time, in his Fifth Circuit appeal, that the statute of limitations barring his suit was tolled by Article 5539a TEX. REV. CIV. STAT. ANN.

Griffen's contention that his "second suit" was timely filed is without merit in that the plain words of the

statute are that "such action shall be commenced in court of proper jurisdiction." (Emphasis added.) In this case, the first "such action" was an attempted appeal to a state court of a state administrative agency decision (Texas State Board of Education) pursuant to Art. 6252-13a TEX. REV. CIV. STAT. ANN. (Administrative Procedure and Texas Register Act). Griffen's petition in the 261st District Court of Travis County, Texas, did not seek relief under §§1981, 1983, or 1985; it merely sought judicial review of administrative agency action. Griffen's appeal of the agency decision was dismissed by the state court for failure to timely file a Motion for Rehearing with the State Board of Education, such Motion for Rehearing being a jurisdictional prerequisite to an appeal to the state court. See also TEX. REV.

CIV. STAT. ANN. art 6252-13a §16(e). The "second suit" filed by Griffen was a §§1981, 1983, 1985 suit filed in United States District Court, and was not an appeal of the order of the State Board of Education. The two actions are not the same "action" within the meaning of said Article 55539a.

The U.S. District Court for the Northern District of Texas, is not a "court of proper jurisdiction" for seeking a judicial review of a state administrative agency decision. 28 U.S.C. §§1331, 1332. In Texas, the exclusive court of proper jurisdiction for judicial review of a State Board of Education decision is a District Court of Travis County, Texas. TEX. REV. CIV. STAT. ANN. art. 6252-13a §10(b)(1).

In Garrett vs. Hartford Accident & Indemnity Company, 107 S.W.2d 726 (Tex.

Civ. App. - Eastland 1937, no writ), a workman's compensation case wherein the Plaintiff, after his appeal from the Industrial Accident Board had been removed from State District Court to United States District Court, voluntarily non-suited while in the Federal District Court. The parties agreed that the Federal District Court had jurisdiction. After the non-suit, Plaintiff refiled his case in the State District Court reducing his claim for less than $3,000 so that the Federal District Court did not then have jurisdiction. The Defendant's plea of limitations was affirmed as against the urging of Article 5539a and, in so holding, the appellate court held that the said Article was not applicable for the reason that the first Court had jurisdiction, and that Article 5539a applied only when there was an absence of

jurisdiction in the first suit. The Court stated:

> The only inference is that the first action was commenced in a Court of improper jurisdiction. (Court's italics.)
>
> * * *
>
> It is evident, therefore, that article 5539a was designed to aid the litigant who (by mistake and in good faith) filed his suit in a court which did not have jurisdiction.

"Article 5539a affords relief only when the dismissal of the former action was for lack of jurisdiction; if the court had jurisdiction, the statute is not tolled." Oram vs. General American Oil Company of Texas , 503 S.W.2d 697 (Tex. Civ. App. - Eastland 1973, writ ref. n.r.e.).

In the case at bar, the District Court of Travis County was not a court of improper jurisdiction, but Griffen's suit was barred because he failed to com-

ply with the conditions precedent (filing a Motion for Rehearing) prior to the filing of his suit in State District Court.

In the case at bar, Griffen did not mistakenly bring his §§1981, 1983, 1985 action in the State district Court of Travis County. "Such action" that Griffen brought in the District Court of Travis County was an appeal from a state administrative agency decision seeking judicial review. Even that appeal to state court was not mistakenly brought in the wrong court; i.e., Griffen did not choose the wrong court. If Griffen had complied with the statutorily mandated Motion for Rehearing before the State Board of Education, the case could not have been dismissed for want of jurisdiction.

In Chalmers vs. American National Insurance Company, 103 S.W.2d 228 (Tex.

Civ. App. - El Paso 1937, no writ), a case involving a suit on a life insurance policy, the "first suit" was dismissed by the District Court for improper joinder of parties and improper joinder of causes of action (a situation not unlike dismissal for failure to file a Motion for Rehearing, inasmuch as the courts in both situations have inherent power over the case but there is some procedural impediment). In the "second case" the trial court sustained a plea of limitation as against a plea of tolling under Article 5539a. The sole question on appeal was whether Article 5539a was applicable. In affirming the District Court's dismissal on limitations grounds, the appellate court held that Article 5539a was applicable. In affirming the District Court's dismissal on limitations grounds, the appellate court held

that Article 5539a was not applicable, stating:

> In order for the pendency and dismissal of a suit to toll the statute, the suit must have been first filed in a court that lacked jurisdiction, or, as the caption of the act expressed it, 'in the wrong court.'

The District Court of Travis County did not inherently lack jurisdiction (of a properly perfected appeal); the case was dismissed for failure to satisfy a "jurisdictional prerequisite", i.e., for failure to file a motion for rehearing with the State Board of Education. Article 5539a is not applicable to the instant case. Griffen's Fifth Circuit brief does not cite a single case in support of his contention that it is applicable in this situation.

Petitioners respectfully submit that the Texas two-year statute of limitations was not tolled by Article 5539a.

Petitioners respectfully submit that the authorities cited above and the language of Article 5539a itself clearly show that such article has absolutely no application to the case at bar.

THE FIFTH CIRCUIT COURT OF APPEALS' DECISION REGARDING COLLATERAL ESTOPPEL IS IN CONFLICT WITH THE UNITED STATES SUPREME COURT POSITION ON COLLATERAL ESTOPPEL, AND THEREFORE SHOULD BE REVERSED.

The District Court correctly dismissed Griffen's claim on the ground that it was collaterally estopped by the findings of the Texas State Board of Education.

In his Fifth Circuit brief, Griffen correctly acknowledges that the doctrine of collateral estoppel precludes a party from relitigating an issue which has been decided in a prior adjudication involving one of the present parties or their privies. On page 34 of his Fifth Circuit

brief, Griffen correctly acknowledges that the principles of collateral estoppel can also apply to state administrative determinations. Further, on page 35 of his Fifth Circuit brief, Griffen correctly acknowledges that the Fifth Circuit had adopted United States v. Utah Construction & Mining Co., 384 U.S. 394 86 S.Ct. 1545, 16 L.Ed2d 642 (1966) guidelines for applying collateral estoppel.

Petitioner's position advocating the application of collateral estoppel is not inconsistent with the position taken above that the state court action and the federal court action were not the "same action", because collateral estoppel acts to bar relitigation of factual issues already determined; identity of actions is not a prerequisite under principles of collateral estoppel as distinguished from

principles of res judicata.

The state Board of Education's procedures were intirely appropriate and adequate.

Griffen had a full and fair opportunity to, and in fact did, litigate his contention of racial discrimination during the state administrative procedures. The administrative procedures were not inferior; Griffen was accorded a full adversarial hearing. As the U.S. District Court noted in its Memorandum Opinion: "The completeness of this hearing is indicated by the length of the record (408 pages) and the number of witnesses and exhibits considered in this proceeding." Griffen was present in person and represented by counsel at the state administrative hearing which requited two days, and in which nine witnesses testified and were subjected to

direct and cross-examination, 23 exhibits were admitted in evidence, and 408 pages of testimony were transcribed.

The Fifth Circuit had previously followed Painters District Council v. Edgewood Construction Co., 416 F.2d 1081 (5th Cir. 1969).

Nasen v. Brown, 595 F.2d 801 (D.C. Cir. 1979) specifically addressed the applicability of collateral estoppel. In Nasen, the Office of Federal Equal Employment Opportunity had upheld an Army civilian employee's charge of reprisal (reprisal because Nasen had earlier filed a discrimination complaint). The Federal Employees Appeals Authority upheld the Army's termination of Nasem and rejected Nasem's claims of discrimination. Plaintiff Nasem filed suit in U.S. District Court seeking judicial review of that FEAA decision pursuant to Title VII.

Both the trial court and the appellate court rejected Plaintiff's contention that the Defendant Army was precluded by the OFEEO findings from relitigating the validity of his discharge. Although the D.C. Circuit Court found the OFEEO hearing to be inadequate for the application of collateral estoppel, the Court did cite the Supreme Court case of Utah Construction and did list the same factors, i.e., "full-dress adversary proceedings, with testimony, cross-examination, exhibits, briefs and argument," as insuring the adequacy of a hearing so that collateral estoppel could be subsequently applied to bar re-litigation of factual issues already determined.

The hearing that was afforded Griffen satisfies the "judicial capacity, full-hearing, representation by counsel, opporutnity to present evidence, and op-

portunity to call, examine, and cross-examine witnesses" requirements of Utah Construction, supra, and Painters District Council, supra.

Griffen complains in his Fifth Circuit brief that the State Board of Education had no opportunity to assess the credibility of the witnesses. He fails to mention that the Commissioner of Education did not have an opportunity to assess credibility of witnesses either. Only the hearing officer heard live testimony. Perhaps the differing treatment given the Commissioner and the State Board by Griffen's brief is because the Commissioner's decision was favorable and the State Board's was not.

The argument that the State Board had no opportunity to assess the credibility of the witnesses does not in any way detract from the adequacy of the

proceedings afforded to Griffen. If Griffen's argument is followed to its logical conclusion, it would mean that no appellate court could reverse the finder of fact on factual grounds, i.e., no evidence or insufficiency of evidence. That, of course, is not the law; appellate courts do have the power to reverse a decision on grounds of no evidence or insufficient evidence, just as the State Board had the power to reverse the Commissioner based on the record and statement of facts before it (just as appellate courts base their decisions on the record before them).

A federal district court's factual decisions are reversed only when they are "clearly erroneous." United States v. United States Gypsum Co., 333 U.S. 364 68 S.Ct 525, 92 L.Ed 746 (1948). The standard for reviewing a federal jury verdict is "whether the

state of proof is such that reasonable and impartial minds could reach the conclusion the jury expressed in its verdict." Prudential Insurance Company of America v. Schreffler, 376 F.2d 397 (5th Cir. 1967) cert. denied 389 U.S. 1005. And, in Texas, the courts of civil appeals have the power to determine the sufficiency of the evidence to support a finding or verdict. Missouri Pacific Railroad Co. v. Duncan, 353 S.W. 2d 315 (Tex. Civ. App. - Austin, 1962).

Another analogy that can be made is the Texas and the federal administrative procedure acts. In both Texas and federal administrative procedure, appellate review of the initial findings of fact are provided for, without the reviewing authorities ever seeing any live witnesses. See TEX. REV. CIV. STAT. ANN. art 6252-13a. No case was found in which

either the Texas act or the federal administrative procedure act has been found to be legally deficient (or denied collateral estoppel effect) because they provide for appellate review without live witnesses.

There was absolutely no improper conduct on the part of anyone representing Petitioners or the Texas State Board of Education.

No one representing Big Spring Independent School District or the State Board of Education did anything improper in the appeal to said Board of Education.

It is true that an attorney with the Texas Education Agency contacted Petitioners' attorney and asked that he submit proposed findings of fact and a proposed order. Such findings of fact and proposed order were indeed prepared and delivered to the State Board of Education

on January 13, 1979, the date set for announcement of the Board's decision. "Announcement" of the decision is stressed because both parties were well aware that, under the rules of the State Board, no oral argument nor live testimony would be permitted on January 13. It should be noted, however, that the request for the proposed order was not made until three days before the date set for announcement of the Board's decision. The record on appeal had been set by the Commissioner to the State Board of Education on December 13, 1978. Big Spring's Brief had been mailed to the State Board on December 12, 1978. The State Board of Education had had a full month in which to consider the record on appeal and the only brief submitted (Griffen declining to submit one) before the State Board ever saw the proposed findings of fact

and the proposed order. Finally, it should be noted that preparation of the proposed order was completely proper and aboveboard. As the trial judge in the case at bar noted "it is a common practice to prepare a judgment to a court and findings of fact and conclusions of law." If Petitioner's attorney had been doing anything improper or underhanded, he certainly would not have sent a carbon copy of his transmittal letter (transmitting the proposed order) to his opposing counsel.

There is no scintilla of evidence that there was any communication involving "any issue of fact or law." Certainly the Board's attorney was not prohibited from communication since he was not "assigned to render a decision." Certainly there is no showing by Griffen that, in any event, the order of the

Texas State Board of Education (consisting of 24 members) should be, or properly could be, set aside based upon the unfounded suspicions of Griffen.

Until overruled, Utah Construction, supra, and Painters Council, supra, are still the law as to the applicability of collateral estoppel, i.e., where there has been a full-dress adversary hearing with representation of counsel, direct and cross-examination of witnesses, exhibits, and briefs, it is entirely appropriate for a court to bar re-litigation of the same factual issues already determined by a quasi-judicial tribunal.

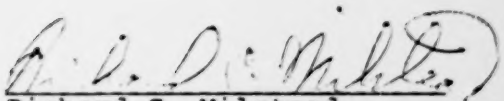
From all of the above, it can be seen that the District Court was certainly acting within the proper scope of its discretion in giving preclusive effect to the prior adverse findings made by the Texas State Board of Education.

CONCLUSION

For the reason set forth above, it is respectfully submitted that this Petition for Certiorari should be granted in order to correct the serious misapplication of the law by the Court of Appeals for the Fifth Circuit.

Respectifully submitted

RANDAL PATTERSON
1205 West University
Odessa, Texas



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Big Spring, Texas 79720
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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari was served on opposing counsel, Mady Gilson, Bredhoff and Kaiser, 1000 Connecticut Avenue, N.W., Washington, D.c. 20036, by depositing same in United States Post Office with first class postage pre-paid on the 30th day of August, 1983.

Richard C. Milstead

APPENDIXES

A, B, C, and D

APPENDIX A

CONSITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution, Fourteenth Amendment Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and

shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kins, and to no other."

42 U.S.C. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1985:

"(1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by

like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such

juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructin, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for his lawfully enforcing, or attempting to enforce the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any state or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal priveleges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or

Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to in any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the

conspirators."

Texas Statute Article 5526(1):

"There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another."

Texas Statute Article 5539(a):

"When an action shall be dismissed in any way, or a judgment therein shall be set aside or annulled in a direct proceeding, because of a want of jurisdiction of the Trial Court in which such action shall have been filed, and within sixty (60) days after such dismissal or other disposition becomes final, such action shall be commenced in a Court of Proper Jurisdiction, the period between the date of first filing and that of commencement in the second Court shall not be counted as a part of the period of limitation unless the opposite party shall in abatement show the first filing to

have been in intentional disregard of jurisdiction. Acts 1931, 42nd Leg., p. 124, ch. 81, §1."

Texas Statute Article 6252-13a §16(e):

"Except as provided in Subsection (c) of this section, a motion for rehearsing is a prerequisite to an appeal. A motion for rehearing must be filed within 15 days after the date of rendition of a final decision or order. Replies to a motion for rehearing must be filed with the agency within 25 days after the date of rendition of the final decision or order, and agency action on the motion must be taken within 45 days after the date of rendition of the final decision or order. If agency action is not taken within the 45-day period, the motion for rehearing is overruled by operation of law 45 days after the date of rendition of the final decision or order. The agency may by written order extend the period of time for filing the motions and replies and taking agency action, except that an extension may not extend the period for agency action

beyond 90 days after the date of rendition of the final decision or order. In the event of an extension, the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date of the final decision or order."

Texas Statute Article 6252-13a §19(a&b):

"(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to a judicial review under this Act. This section is cumulative of other means of redress provided by statute.

"(b) Proceedings for review are instituted by filing a petition within 30 days after the decision complained of is final and appealable. Unless otherwise provided by statute:

(1) the petition is filed in a District Court of Travis County, Texas;

(2) a copy of the petition must be served on the agency and all parties of record

in the proceedings before the agency; and

(3) the filing of the petition vacates an agency decision for which trial de novo is the manner of review authorized by law, but does not affect the enforcement of an agency decision for which another manner of review is authorized."

APPENDIX B

A. Opinion of the United States Court of Appeals, Fifth Circuit:

JAMES GRIFFIN, Plaintiff-Appellant,

v.

BIG SPRING INDEPENDENT SCHOOL DISTRICT, et al.
Defendants-Appelees.

No. 80-2149.

United States Court of Appeals,
Fifth Circuit.

June 9, 1983

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, GOLDBERG and HIGGINBOTHAM, Circuit Judges.

GOLDBERG, Circuit Judge:

This appeal from a summary judgment for the defendant in a civil rights case raises two procedural issues. Appellant Griffin was a teacher in the Big Spring Independent School District whose contract was not renewed. Griffin believed this nonrenewal was racially motivated and pursued administrative remedies in the state system. These remedies were ultimately unsuccessful and Griffin filed a civil

rights action in federal court. On Big Spring's motion for summary judgment, the trial court ruled against Griffen on the grounds that Griffen's claim was barred by the statute of limitations and, alternatively, that Griffen was collaterally estopped by the state proceedings. We reverse and remand for further proceedings.

I. INTRODUCTION

Beginning in 1973, Griffen was employed by the Big Spring Independent School District ("Big Spring") as a high school teacher/coach under a series of one year contracts. After various internal decision-making procedures, Big Spring notified Griffen on May 13, 1977 that his contract would not be renewed. Griffen, a black, believed his termination was racially motivated and requested a hearing befor the school board. On June 9, 1977, the board held a hearing and determined it would take no action, thus letting Griffen's contract lapse.

Griffen then appealed the board's decision to the Texas Education Agency under Tex. Educ.Code Ann. §11.13 (Vernon 1972), alleging

that his discharge was racially motivated. Beginning December 8, 1977, the Assistant Deputy Commissioner of Education conducted two days of hearing with testimony from various witnesses. On September 15, 1978, the hearing officer issued a Proposal for Decision including findings of fact and conclusions of law, finding that Griffen's discharge was racially motivated and recommending reinstatement with back pay. The hearing officer's recommendations were transmitted to the Texas Commissioner of Education, who was charged by law with the duty of making the actual decision. On November 14, 1978, the Commissioner issued a decision, which essentially adopted the hearing officer's proposed decision.

Big Spring appealed this decision to the Texas State Board of Education. During the pendency of the appeal, Big Spring had two ex parte contacts with the Board. First, during an unrelated conversation between Jim Binnion, a State Board member, and Lynn Hise, Superintendent of Big Spring, Binnion asked Hise "to

send him some material in regard to" the appeal. Hise deposition at 42. Second, in January, 1979, the General Counsel of the Texas Education Agency spoke to Big Spring's counsel and asked him to submit proposed findings and a proposed order. Griffen was neither advised of this request nor asked to submit his own proposed findings or orders. On January 12, 1979, Hise delivered the proposed findings and order to the State Board. On January 13, 1979, the State Board adopted the proposed findings and orders as its own. The State Board "found" that Griffen's termination was properly motivated and reversed the Commissioner's findings and ruling. The State Board held no actual hearing and gave no explanation for reversing the findings of the Commissioner and hearing examiner, which were based on a full evidentiary hearing.

On February 12, 1979, Griffen filed for judicial review of the Board's decision in the state district court of Travis County. This is the court charged with exclusive jurisdiction of review of actions of the State Board. One of the jurisdictional prerequisites for re-

view of a State Board decision, however, is that a motion for rehearing be filed with the State Board. Tex.Rev.Civ.Stat.Ann. art 6252-13a (Vernon 1970). Because Griffen had failed to file a Motion for Rehearing, the court determined that it was without jurisdiction and dismissed the case on May 30, 1979.

One week later, on June 8, 1979, Griffen filed a complaint in federal district court under 42 U.S.C. §§ 1981, 1983, and 1985, on the same grounds and requesting the same relief. The district court granted Big Spring's motion for summary judgment on two grounds. First, the court held that Griffen's action accrued on May 13, 1977. The relevant statute of limitations is two years, Tex.Rev.Civ.Ann. art. 5526 (Vernon 1958), so Griffen's suit, filed June 8, 1979, was barred. Second, the court held that Griffen was collaterally estopped by the State Board's findings. This appeal followed.[1]

---

1. Oral argument in this case was postponed pending the ultimate resolution of similar issues in Patsy v. Florida Int'l Univ., 634 F.2d 900 (5th Cir.1981) (en banc), rev'd,— U.S.— , 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

On appeal Griffen argues that both of the district court's rulings were incorrect. Griffin provides three arguments that his claim is not barred by the statute of limitations. First, he urges that the statute should be tolled while pursuing state administrative remedies. Second, he claims that Big Spring's June 9, 1977, decision was a separately actionable event within the two year statute. Third, he contends that the Texas "wrong court" tolling statute, Tex.Rev.Civ. Stat.Ann. art. 5539a (Vernon 1958), applies and tolled the statute during the pendency of the state court proceedings. Griffin also argues that the proceeding of the State Board should not be given collateral effect because it was not based on adequate procedures and because of the ex parte contacts. We shall treat these arguments in turn.

II. STATUTE OF LIMITATIONS

A. State Law, Exhaustion, and Tolling

Griffin argues that the statute of limitations should have been tolled during the

time he was exhausting state administrative remedies. During the pendency of this appeal the Supreme Court clarified this point in Patsy v. Board of Regents, —U.S.—, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). Patsy held that state administrative exhaustion is not required to pursue a federal section 1983 action. Patsy specifically mentioned the continuing vitality of Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed2d 440 (1980), which held that pursuing state remedies does not toll the statute of limitations for section 1983 actions. Patsy, —U.S. at — n. 17, 102 S.Ct. at 2567 n. 17,73 L.Ed.2d at 186 n.17. Accordingly, any tolling must be by operation of the state law.

B. Accrual of the Cause of Action and the June 9 Board Meeting

Griffen was notified on May 13, 1977 that his contract would not be renewed. On June 9, 1977, the school board provided Griffen with a hearing and declined to take action leading to a renewal of Griffin's contract. Because Griffen's suit was filed June 8, 1979, the

June 9, 1977 date is crucial. Below Griffin argued that his cause of action did not accrue until June 9, 1977. This argument is foreclosed by Deleware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed2d 431 (1980), holding that reconsideration of a discriminatory decision does not draw the accrual of a cause of action past the initial date of decision. Griffen does not press this argument on appeal.

Instead, Griffen argues on appeal that the June 9, 1977, decision constitutes an independent actionable event. This allegation was made in Griffen's complaint:

> On June 9, 1977, the Board of Trustees of the Big Spring Independent School District voted not to renew Plaintiff's contract to teach in the District. Plaintiff alleges that the School Board, acting in concert with Defendants McKenzie, Smith and Robbins, took this action on account of Plaintiff's race.

Record at 3. Thus, the claim that the June 9, 1977 meeting was an independent actionable event was before the court from the very first.

The trial court handled this allegation by holding that "[t]he board took no action after the hearing of June 9, 1977 but let stand its decision in May." Record at 225. Big Spring here makes the same argument-the board did nothing on June 9, so no cause of action arose on that date. We are not persuaded that a sin of omission cannot be an actionable event.

The board, by its own rules, was obligated to give Griffen a hearing. A hearing necessitates a decision whether to alter the status quo. The fact that the board chose to preserve the status quo does not cause the decision to evaporate into the mists. If the decision to preserve the status quo were nondiscriminatory, such as a review of the principal's recommendation under some kind of plain error standard, Griffen will not prevail. On the other hand, Griffen might well be able to show that the decision to preserve the status quo was itself discriminatorily motivated. Ricks certainly does not preclude this commonsense notion. Cf. Al-Hamdani v.

State University, 438 F.Supp. 299 (W.D.N.Y. 1977) (improper review of tenure decision may itself give rise to Title VII claim). In short, we hold that Griffen has alleged a cause of action accruing on June 9, 1977, that will withstand the plea of limitations; in light of the rest of our holding, however, this portion is of little practical import.

C. Texas' Wrong Court Tolling Statute

Griffin's broadest argument is that the entire claim is saved from the statute of limitations by Texas' "wrong court" tolling statute. Tex.Rev.Civ.Stat.Ann. art. 5539a (Vernon 1958) provides:

> Limitations on dismissal for want of jurisdiction and refiling action in proper court
>
> When an action shall be dismissed in any way, or a judgment therein shall be set aside or annulled in a direct proceeding, because of a want of jurisdiction of the Trial Court in which such action shall have been filed, and within sixty (60) days after such dismissal or other disposition becomes final, such action shall be commenced in a Court of Proper Jurisdiction, the period between the date of first filing and that of commencement in the second

> Court shall not be counted as a part of the period of limitation unless the opposite party shall in abatement show the first filing to have been in intentional disregard of jurisdiction.

Griffin's argument is that the action in state district court was dismissed for lack of jurisdiction. The present claim was filed in federal court within sixty days. Thus, the statute applies by its literal terms.

Big Spring makes two arguments in response. First, it argues that the state district court was not a court of improper jurisdiction. It was the right court, but the appeal was pursued in the wrong manner. Second, Big Spring argues that the proceeding in federal court under the civil rights statutes is a different cause of action from review of a state administrative action in a state court. We shall first note a few general points about the saving statute and then address Big Spring's two arguments.

1. Art. 5539a. Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed. 2d 440 (1980), instructs us to apply state law

as to tolling. This includes not only state statutes, but also state construction of state statutes. Thus, in interpreting article 5539a, we are guided by state construction.

Two general issues are relevant before proceeding to the merits of Big Spring's two arguments. First we should consider whether the policies of the statute of limitations would be served by applying it to this case. In a recent Fifth Circuit case deciding whether article 5539a would apply when the first suit was in a court of a different state, the court stated:

> Finally, we note that Dickers' suggested rule would not further the policies that ordinarily provide justification for the results otherwise created by statutes of limitations:
>
> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of stale claims in

> time comes to prevail over the right to prosecute them."
>
> Burnett v. New York Central Railroad Co., 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed. 2d 941 (1965). It will virtually always be the case, as here, that a defendant who seeks a dismissal based on want of jurisdiction will have actual notice that the plaintiff intends to pursue a claim against him; given the extremely high probability that the plaintiff will refile in a proper court if the defendant is successful in obtaining the dismissal in the forum of the plaintiff's choice, the defendant has no one but himself to blame if evidence is lost, memories fade, and witnesses disappear.

Long Island Trust Co. v. Dicker, 659 F.2d 641, 647 (5th Cir.1981). Big Spring had ample actual notice that Griffen intended to pursue his claim, and like the court in Long Island we see no purpose of the statute of limitations that will be served by its application here.

The second general point has to do with the nature of article 5539a. Articles 5539a and 5539b, allowing for amending pleadings, "are remedial, designed to protect a litigant from loss of his cause of action by a plea of limitation under circumstances under which

that would otherwise occur. They should be liberally construed and applied to effect that purpose." Republic National Bank v. Rogers, 575 S.W.2d 643, 647 (Tex.Civ.App—Waco 1978, writ ref'd n.r.e.). "It is manifest that the Act is remedial in its every essence. It should therefore be given a liberal construction with a view of effectuating its manifest objective—relief from penalty of limitation bar to one who has mistakenly brought his action 'in the wrong court.'" Burford v. Sun Oil Co., 186 S.W.2d 306, 310 (Tex.Civ. App. —Austin 1944, no writ).

Thus, in considering the arguments regarding the statute of limitations, we must keep in mind that we are deciding a case in which application of the statute of limitations would serve no purpose other than allowing Big Spring to escape trial, and that we are construing a remedial statute designed to be liberally applied.

2. Wrong Court? —Big Spring's first argument is that the dismissal for want of

jurisdiction in the state district court is not the kind of jurisdictional dismissal article 5539a was intended to cover. Instead, Big Spring claims, article 5539a was designed to reach only a "wrong court" sort of lack of jurisdiction. Big Spring argues that the district court in Travis County was the right court, but the appeal was taken in the wrong manner, so article 5539a should not apply

We are not persuaded. First, the statute by its very term applies: "When an action shall be dismissed in any way ...because of a want of jurisdiction..." Tex.Rev.Civ.Stat.Ann. art. 5539a (Vernon 1958) (emphases added). The state district court plainly stated "[t]his Court does not have jurisdiction to hear the claim of the Petitioner, James E. Griffin." Record at 15. Typically, a statute may be stretched a little bit beyond its literal terms to effectuate its policies. Here Big Spring asks us to constrict a remedial statute designed to be liberally construed, to narrow its scope in spite of its literal terms,

when to do so would frustrate its purpose and would not promote the purposes of the statute of limitations. We are reluctant to do so.

Big Spring appears to rely on the language quoted above from Burford to support a theory that article 5539a applies only to some kind of intrinsic lack of jurisdiction making a court a "wrong court." Burford itself negates that narrow reading. Burfordinvolved review of a decision by the Texas Railroad Commission. The plaintiffs had initially pressed their claim in federal court on both state and fourteenth amendment grounds. The Supreme Court held, however, that the existence of substantial state administrative remedies suggested that the federal courts should stay the exercise of their equitable jurisdiction. Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424(1943). After dismissal in the federal courts the plaintiffs pressed their claim in the state courts. The defendants raised the statute of limitations and the plaintiffs responded that article 5539a tolled

the statute. The Texas Court of Civil Appeals agreed. Burford v. Sun Oil Co., 186 S.W.2d 306 (Tex.Civ.App.—Austin 1944, no writ).

Burford, as the source of the "wrong court" phrase relied upon by Big Spring, can give us some insight into what was meant by the phrase. Burford points out, id. at 310, that the phrase originates in the caption of the article as it was enacted: "An Act to extend the period of limitation because of filing of any action in the wrong Court, unless opposite party shows intentional disregard of jurisdiction; and declaring an emergency." The text of the article does not mention "wrong court." It speaks of "a want of jurisdiction." Thus,the legislature appears to have thought the wrong court was one that wanted jurisdiction.

The Burford court was primarily struggling with the question whether a discretionary dismissal by a federal court that clearly has subjct matter jurisdiction would count as a dismissal for want of jurisdiction under

article 5539a:

> And we think clearly the judgement of the Supreme Court was tantamount to a dismissal "because of a want of jurisdiction" within the meaning of Art. 5539a. The word "jurisdiction" is used in the sense of venue, even in cases where venue is not fundamentally jurisdictional and is subject to waiver. A dismissal on the ground of improper venue (before our present statutes governing transfer of such cases) would be for want of jurisdiction. The dismissal in the Sun case [Burford in the Supreme Court] was clearly because the action was not brought in a "proper court." Art. 5539a was clearly designed to apply to such dismissal. To hold otherwise would give concontrolling effect to form and not to substance. The appellees brought their suit in the Federal Court. It was dismissed because the State courts were the proper courts or courts of proper jurisdiction in which to bring suit. Manifestly the dismissal was because the Federal Court was a wrong court, an "improper court," and therefore in effect a "court of improper jurisdiction."

Id. at 315.

The use of the "wrong court" language in Burford was for a very different purpose from that urged by Big Spring. The court in Burford certainly saw the key statutory test as whether the first court was a "court of improper jurisdiction." In Burford the problem

was whether the statutory language would be stretched to cover a court of proper jurisdiction that chose not to exercise that jurisdiction because an alternate forum was preferable. In other words Burford was concerned with whether a "wrong" court could count as an article 5539a court of improper jurisdiction.

We have no question that the dismissal of Griffen's case by the state court was for want of jurisdiction. But Big Spring attempts to turn Burford topsy-turvy and have us read want of jurisdiction as some narrower kind of euphemism for "wrong court." We will not employ such an unnatural construction, expecially when "wrong court" was so clearly used to mean "a court of improper jurisdiction." Rather, we hold that a dismissal specifically denoted a dismissal for want of jurisdication is in fact a dismissal for want of jurisdiction within the meaning of article 5539a.

3. Same Action?—Big Spring's second argument against the applicability of article 5539a is that article 5539a applies only when an action is dismissed for want of jurisdic-

tion and such action is filed in a court of proper jurisdiction. Although Big spring took precisely the opposite position before the district court to support its res judicata argument,[2] before this Court Big Spring argues that the action in state court was for review of a state administrative decision, whereas the action in federal court was for violation of federal civil rights statutes. We believe that this argument would "give controlling

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2. THE COURT: What is the difference between collateral estoppel and res judicata?

MR. MILSTEAD [counsel] for Big Spring]: I think there may be some fine judicial lines there, Your Honor.

THE COURT: Is this the same cause of action, the one before the Board of Education and the one in the court?

MR. MILSTEAD: Yes, sir, they were asking—the petition of the Plaintiff before the Board, as I recall, asked for the same sort of relief as asked for here.

THE COURT: That is the only possible distinction I can see on the facts of this case, it might have a little different cause of action there, 1983 is created by Congress, and this procedure is created by the State Legislature.

MR. MILSTEAD: It is the same facts, Judge.

THE COURT: Yes, I wasn't worried about it being the same facts.

MR. MILSTEAD: Yes, sir.
Record at II-94.

effect to form and not to substance," Burford, 186 S.W.2d at 315, and we reject it.

The essence of both actions was that Griffen claimed he had been dismissed for racially discriminatory motives in violation of his right to be free from racial discrimination. The opinion of the hearing officer and the decision of the Texas Commissioner of Education specifically cited Griffen's constitutional right to be free from discrimination. In both state and federal courts the relief Griffen requested was reinstatement and back pay. The substance of the two actions is certainly the same. The sole difference between them-one involved review of the claim by a state administrative agency and one involved review of the claim under federal civil rights statutes-is nothing more than a difference in form. The underlying cause of action is the same. We will not adopt Big Spring's reading of a remedial statute intended to be liberally construed when the result would be to elevate form over substance.

The Texas case most on point supports our view of article 5539a. Republic National Bank v. Rogers, 575 S.W.2d 643 (Tex.Civ.App.-Waco 1978, writ ref'd n.r.e.), involved a dispute over whether land had been adversely possessed. The suit was initially filed in federal court in diversity, and the owner of record initially requested money damages for the trespass and injunctive relief granting title. The injunctive aspect of the suit required joinder of a party that would destroy diversity, so the complaint was amended to delete that claim. Unfortunately for the plaintiffs, the resulting monetary claims were below the federal court's jurisdictional amount; consequently, the suit was dismissed. The plaintiffs then brought a suit to try title in state court. The defendants argued that the suit to try title was a different action from the suit for damages for trespass in the federal court. The state court rejected the defendant's argument:

> Defendant argues that because plaintiff dropped the issue of title from its pleadings in the Federal Court,

> and because that issue was not before the Court when the case was dismissed, it was effectively abandoned and not brought forward in the case at bar under the provisions of Article 5539a. Defendant emphasizes the words "such action dismissed" in the statute. We reject that argument. Under the statute, the case before us is a continuation of the suit originally filed in Federal Court. The "action" brought forward was the one pleaded there, and any permissible amendments to it under Article 5539b. As we have previously stated, the pleadings in Federal court contained all the allegations necessary to try title to the property simply by tacking on a prayer for that relief.

Id. at 647

In the instant case Griffen does not even need to tack on a prayer for different relief, because the relief requested was the same in both cases. The pleadings in the state proceedings contain all of the allegations necessary to establish a violation of the federal civil rights statutes. The relief requested is the same. We refuse to read article 5539a as holding that actions are not the same merely because the same facts can support the same relief for violation of the same rights under two different enforcement schemes.

In summary, we hold that a dismissal for

failure to satisfy a jurisdictional prerequisite for judicial review of an administrative decision is a dismissal for want of jurisdiction within article 5539a. Furthermore, a federal section 1983 action to vindicate the same rights underlying the claim for review of the administrative decision constitutes the same action as review of the administrative decision for purposes of article 5539a. Thus, Griffen's claim is not barred by the statute of limitations because article 5539a tolled the statute.

III. COLLATERAL ESTOPPEL

The second ground supporting the district court's summary judgment in favor of Big Spring was that Griffen was collaterally estopped by the findings of the State Board of Education that Griffen's nonrenewal was not discriminatorily motivated.[3] We disagree. In

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3. This point was raised below under the rubric of both collateral estoppel and res judicata. The doctrines, of course, have differences, but those differences are not relevant here. We, like the district court, will treat both together under the nom de guerre of collateral estoppel.

this case the procedures of the state administrative body, the State Board, were so grossly inadequate as to call for whatever damage control measures we may impose.

> We have previously recognized that the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue. Allen v. McCurry, 449 U.S.[90], at 95[101 S. Ct. 411, 415, 66 L.Ed.2d 308]; Montana v. United States, 440 U.S. 147, 153 [99 S.Ct. 970, 973, 59 L.Ed.2d 210] (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-29 [91 S.Ct. 1434, 1442-43, 28 L.Ed.2d 788]. "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of the procedures followed in the prior litigation." Montana v. United States. 440 U.S. at 164 n. 11 [99 S.Ct. at 979 n. 11]. Cf. Gibson v. Berryhill, 411 U.S. 564 [93 S.Ct. 1689, 36 L.Ed.2d 488] (1973).

Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S.Ct. 1883, 1897, 72 L.Ed.2d 262 (1982) (footnote omitted). On some occasions findings made by administrative bodies may be given collateral effect. See, e.g., United States v. Utah Construction & Mining Co., 384 U.S.394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966); Painters District Council No. 38 v. Edgewood

Contracting Co., 416 F.2d 1081 (5th Cir.1969); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4475 (1981). This is not one of those occasions.[4] We believe that here there is good reason to doubt the quality, extensiveness, and fairness of the procedures followed.

To briefly restate the procedures followed, first a hearing officer heard two days' worth of testimony, producing a record of some 408 pages. The parties were represented by counsel, the nine witnesses were examined and cross-examined, and twenty-three exhibits were introduced. The hearing officer acknowledged the difficulties in proving racial discrimination: "Of necessity, proof of racial discrimination often rests on circumstantial evidence.

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4. Griffen has argued that it is inappropriate to extend collateral effect to administrative decisions into the context of federal civil rights actions. This is an extremely complex question, see, e.g, 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4471 (1981), as yet unsettled in this Circuit. Because we hold that the state proceedings here do not merit collateral effect, we need not address the more difficult general question.

Invidious discrimination is frequently masked in subtleness and seldom is so blatant as to submit to ease of proof." Plaintiff's Exhibit 22 at 2-3. The hearing officer also recognized that "in those instances where testimony is in direct conflict, the Hearing Officer is charged with the duty to judge the credibility of witnesses and to ascertain the facts which the evidence, considered as a whole, tends to prove." Id. at 3. Based on the testimony and credibility calls among witnesses, the hearing officer concluded that Big Spring's ostensible reasons for not renewing Griffin were "mere pre-texts" and that the real reason was racial discrimination. Id. at 6-7. The Texas Commissioner of Education adopted the hearing officer's findings in making his decision reinstating Griffen.

Up to this point we have no quarrel with the procedures followed. The hearing officer appears to have been conscientious and thorough in reaching his conclusions and findings. Similarly, the Commissioner's decision

appears to be well supported. Our problems concern the procedures in the Texas State Board of Education.

During the pendency of the appeal before the State Board, Big Spring had two ex parte contacts with the Board. One of these was a phone call around January 10, 1979, requesting that Big Spring prepare findings of fact and conclusions of law reversing the hearing officer. See Plaintiff's Exhibit 24. These were delivered on January 12. Id. On January 13, 1979, the State Board adopted this proposal as its decision. The proposed findings were submitted and adopted without hearing any testimony, without giving Griffen any opportunity to respond to Big Spring's proposal, and without giving Griffen any opportunity to submit a proposal of his own. The findings of fact adopted by the State Board basically reversed the credibility calls made by the hearing officer. See Plaintiff's Exhibit 26.

Big Spring argues that Griffen had ample opportunity to cross-examine witnesses, build

a record, and so on. This, Big Spring claims makes the administrative procedure fair and deserving collateral effect. This contention misses the point. We are not concerned so much with the procedures before the hearing officer. Rather, we are concerned with the procedures of the State Board in overturning the findings of the hearing officer. We hold that the procedures of the State Board in this case do not have the requisite indicia of quality, extensiveness, and fairness to merit collateral effect. United States v. Utah Construction & Mining Co., 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966); Painters District Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir.1969).

The most fundamental problem with the State Board proceedings is that the State Board, on the basis of a written record, without the benefit of any live testimoney to support its credibility determinations, chose to reverse the credibility determinations made by

the hearing examiner, who did listen to live testimony and observe the demeanor of the witnesses under direct and cross examination. The most favorable view of this proceeding would be to totally ignore the fact that the hearing officer made findings based on his view of the credibility of the witnesses. Then we could view the Board decision merely as a decision based on a written record without live testimony.

In Nasem v. Brown, 595 F.2d 801, (D.C.Cir. 1979), the court stated:

> We are particularly disturbed by the inability of the parties to present live witness testimony in a proceeding that necessarily turns largely on retaliatory motivation, see B. Schlei & P. Grossman,, Employment Discrimination Law 438-39(1976), and thus demands that the decision-maker weigh witness credibility. Similarly, there is no opportunity to cross-examine opposing witnesses, the importance of which cannot be underrestimated. Any deficiency in agency process that denies parties the procedural opportunity to present their claims for full agency consideration falls short of Utah Construction.

Id. at 807 (footnote omitted). See also 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4475, at 766(1981) ("An

administrative decision based on a written record, without opportunity for examination of cross-examination of live witnesses, for example, is not likely to support preclusion in a subsequent judicial action.") Thus, even under a favorable view of the State Board's proceedings we would not be inclined to give their findings collateral effect.

Of course, this favorable view blinks reality. Here there actually was life testimony with examination and cross examination at one point in the proceedings. However, the person who was in the best position to make the necessary credibility calls among conflicting testimony reached precisely the opposite conclusion from that reached by the State Board based on a cold record. Given that, we are even less inclined to give the State Board's findings any collateral effect.

We do not mean to suggest that a reviewing board may never reverse the decision of a hearing officer and still retain collateral force. However, such a reversal would more

typically be based upon different legal theories or different conclusions and inferences drawn from agreed upon basic facts. At the least, the State Board should have explained why it found the hearing officer's findings of fact to be objectionable. Cf. Boykins v. Ambridge Area School Dist., 621 F.2d 75 79(3rd Cir.1980) (denying collateral effect to administrative decision, noting difficulty of determining exact nature of decision on sparse record before the court). All we can tell from the record is the bottom line that the State Board clairvoyantly chose to believe the witnesses that the hearing examiner chose to disbelieve. This kind of administrative reversal of a hearing officer should not be given collateral effect.

The other major problem lies in the submission of proposed findings by Big Spring. It suggests several factors that standing in isolation do not suffice to deny collateral effect, but that taken together call for denial of collateral effect. First, the request was

ex parte. We do not know if the request for findings was prefaced by argument on the merits or was merely a ministerial request. The State Board does not normally allow oral argument, see Brief for Appellees at 47, and this contact could have been an unfair opportunity for Big Spring to inject its views into the decisionmaking process. We do not mean to suggest that Big Spring in fact did take unfair advantage of that opportunity, but only that the possibility of that exists because the contact was ex parte.[5]

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5. Tex.Rev.Civ.Stat.Ann.art 6252-13a § 17(Vernon Supp. 1982) provides:

> Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not communicate, directly or indirectly, in connection with any issue of fact or law with any agency, person or their representatives, except on notice and opportunity for all parties to participate.

We need not decide whether David Ryan, an attorney with the Texas Education Agency who called Big Spring's counsel, is covered by this statute. We note only that this is the kind of contact that can easily create the appearance of impropriety, and for that reason alone should be avoided.

Second, we are disturbed by the fact that one party was asked to prepare factual findings without giving the other party an opportunity to respond to them. In general, the practice of allowing a prevailing party to prepare a ruling is not conducive to the health of the judicial process. See, e.g., 9 C. Wright & A. Miller, Federal Practice and Procedure § 2578 (1971). The practice is con doned, but in a different context. It is onething for a judge in open court to render an oral decision and ask the prevailing party to produce a written decision in accord with the already-rendered oral decision. It is another thing when a party is asked ex parte to prepare written findings in advance of the actual (or nominal) time of the decision, and not even allow the other party an opportunity to respond.

Third, we find the chronology of these events to be disturbing. The proposed findings were requested at least three days before the purported date of the decision. The deci-

sion recites that on January 13 the Board considered the record and briefs and reached its decision. Given the fact that the State Board merely adopted the findings requested three days earlier, the actual dicision must have been made at an earlier date, before the Board meeting. This suggests that the decision was not actually the product of the collegial decisionmaking the Board is supposed to provide. Tex.Educ.Code Ann.§ 11.13(b)(Vernon 1972).

Though we might not be moved by any one of these problems associated with Big Spring's submission of proposed findings in the aggregate, they are troubling. Just as one mistake on an exam, in isolation, may not call for a failing grade, but a flurry of mistakes will, we hold that the totality of the circumstances surrounding the submission of proposed findings calls for denying collateral effect to those findings after they were adopted by the State Board.

CONCLUSION

Griffen claims that he was not granted a

new contract for employment due to racial discrimination. He assiduously pursued his claim continually from 1977 to the present date. The district court granted judgment against Griffen based on the statute of limitations. The perversity of this result cannot escape us. We find that Texas' "wrong court" tolling statute applies to save Griffen from the statute of limitations. We will not constrict the literal terms of a remedial statute intended to be liberally construed so as to deny Griffen an opportunity to be heard.

Griffen was able, temporarily, to win a victory in the state administrative proceedings. After a full and fair hearing, the hearing officer found for Griffen. Unfortunately, the Texas State Board of Education saw fit to substitute its own credibility calls for those of the person on the scene. Such a procedure would not receive a passing grade under any standard save the most perigeal. In a suit to vindicate one of our most important Constitutional rights our standards should reach

their apogee. Accordingly, we will not grant preclusive effect to the Board's procedure. Accordingly, the judgment below is reversed and the case is remanded for further proceedings.

REVERSED AND REMANDED

B. Opinion of the United States District Court, Northern District of Texas:

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

ABILENE DIVISION

JAMES GRIFFIN,	§	
Plaintiff	§	
v.	§	CIVIL ACTION NO. CA-1-79-20
BIG SPRING INDEPENDENT SCHOOL DISTRICT, et al.,	§	
Defendants	§	

M E M O R A N D U M

On the 25th day of August, 1980, the plaintiff and his attorney and the defendants and their attorneys appeared in court for a hearing on the defendants' motion for summary judgment. After hearing the argument of counsel and considering the pleadings and briefs of the parties, the court is of the opinion that summary judgment be entered for and on behalf of the defendants.

The uncontradicted facts in this case establish that the plaintiff, James Griffin, was a teacher and basket ball coach in the high

school of the Big Spring Independent School District and that he had been so employed on one-year contracts from the fall of 1973 through 1976-77 school year. His last one-year contract expired on May 27, 1977.

In March of 1977, the board of trustees of the school district failed to vote an extension or renewal of Mr. Griffin's contract for the following school year and at its meeting on May 12, 1977, the administration of the school district failed to recommend Mr. Griffin for another one-year contract. Accordingly, under the procedure and policies of the defendant school district, a letter was written to Mr. Griffin on May 13, 1977 advising the plaintiff that his contract would not be renewed. Mr. Griffin has testified that he knew that his current contract expired on May 27, 1977 and when he received the above letter on May 13, 1977, that he was not to be reemployed. At the time of the letter informing him that his contract would not be renewed, he was advised of the school district's

policy (No. 9510), giving him a right of appeal and hearing before the full school board. Such a hearing was held on June 9, 1977 at the plaintiff's request and at which he appeared before the board, but the board took no vote or further action, thereby letting their decision of May 12, 1977 not to reemploy him stand as the final decision of the board.

Subsequently, Mr. Griffin appealed to the Texas Education Agency and a hearing was held before one of its examiners. This hearing examiner recommended that the decision of the Big Spring School Board be reversed and accordingly the Commissioner of Education entered an order reversing the school board's decision. Pursuant to the rules, the school board then appealed to the full State Board of Education. The State Board of Education, after considering the record, reversed its Commissioner and affirmed the decision of the Big Spring Independent School District not to renew Mr. Griffin's contract for the 1977-78 school year. It appears that Mr. Griffin had a full

two-day hearing before the hearing examiner for the Texas Education Agency before whom 408 pages of testimoney was taken, many exhibits and witnesses were introduced and heard. It was upon this record that the full State Board of Education of the State of Texas affirmed the action of the local school district.

The State Board of Education also entered certain findings of fact which found, based upon their record, that the action of the school board with respect to Mr. Griffin's contract was not as a result of racial discrimination but was based upon the personal observations, recommendations of the administration, and Mr. Griffin's performance. It further appears that a black person was employed to take Mr. Griffin's position for the following school year.

The statutes of the State of Texas provide that before there can be an appeal from the State Board of Education to the courts of the State of Texas, that the petitioner

must file a motion for rehearing, which he failed to do within the ten-day period required. Hence, his suit appealing the Board's decision, was dismissed on jurisdictional grounds on May 30, 1979 by the 261st District Court of Travis County, Texas.

Thereafter plaintiff filed his suit in this court on the 8th day of June 1979, alleging that it was because of racial discrimination that he was not reemployed by the defendant school district.

The defendant's motion for summary judgment is based upon pleas of limitations, collateral estoppel, and res judicata.

LIMITATIONS

Article 5526 of the TEX REV. CIV. STAT. is a two-year statute of limitations and in the absence of any federal limitation statute, this Texas period of limitations has been held to be applicable to civil rights actions. Johnson v. Railway Express Agency, 421 U.S. 454, 466 (1975); Jones v. City of San Antonio, 568 F.2d 1224, 1226 (5th Cir. 1978). There-

fore, the determination of the question of limitation depends upon the question of when the plaintiff's cause of action accrued. The alleged act of discrimination is the action of the school board at its meeting on May 12, 1977, and its notification to the plaintiff on May 13, 1977, that he would not be reemployed. It was this action, if proven to be true, that would afford plaintiff his cause of action against the defendants in this case and such cause of action accrued no later than May 13, 1977 and the instant suit was filed more than two years thereafter.

The subsequent hearing by the school board at plaintiff's request on June 9, 1977, was not an act of continuing discrimination but was merely an appeal as provided by the rules of the school board for reconsideration of the board's original action. The board took no action after the hearing of June 9, 1977, but let stand its decision in May. Therefore, plaintiff's cause of action is barred by the two-year statute of limitations.

The fact that the plaintiff was pursuing administrative remedies before the State Board of Education during this two year period does not toll the statute of limitations. Johnson v. Railway Express Agency, supra, at 466.

RES JUDICATA AND COLLATERAL ESTOPPEL

These two pleas by the defendants will be considered jointly. As noted above, the plaintiff was afforded a full adversary proceeding before a hearing examiner of the Texas Education Agency. The completeness of this hearing is indicated by the length of the record (408 pages) and the number of witnesses and exhibits considered in this proceeding. The facts presented to the Texas Education Agency and considered by the State Board of Education for the State of Texas are the same facts alleged in this court, seeking relief under the civil rights statutes. 42 U.S.C. § 1983. A determination of the facts was made by that state agency and the facts were found adversely to the plaintiff. Specifically, the State Board of Education found that the recommendations of

of the administration not to reemploy the plaintiff were not based on Mr. Griffin's race, but were based upon his refusal to perform assigned duties and failure to cooperate with his superiors, as well as unexcused absences from the classroom and from duty stations. Further, the State Board of Education found upon this complete record that the decision of the board of trustees of the district not to offer plaintiff a new contract was based upon the recommendation of the administration and that his race was not considered in reaching the board decision. It was the conclusion of the State Board of Education that:

> "The nonrenewal of petitioner's employment contract was not the result of impermissible racial discrimination on the part of the Big Spring Independent School District."

These facts and the conclusion reached are amply supported by the record before the State Board of Education.

These proceedings before the state agency are those as authorized by Section 11.25 of the Education Code of the State of

Texas. The State Board of Education was acting in a quasi judicial capacity in determining these facts and the findings of such an administrative agency will be sufficient to invoke the doctrine of collateral estoppel in subsequent court proceedings. Nasem v. Brown, 595 F.2d 801, 806 (D.C. Cir. 1978); United States v. Utah Construction and Mining Co., 384 U.S. 394, 421-22 (1966).

The conclusion and order of the State Board of Education has long since been a final decision and the parties before that board are the same parties that are before this court. As the precise question of fact in dispute has been finally determined by the State Board of Education, acting in a quasi judicial proceeding, and the same parties being involved in that proceeding as in this case, collateral estoppel is available to the defendants here as a defense. 1b MOORE'S FEDERAL PRACTICE, Section 0.441(2), at 3777 (2d ed. 1974).

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 8th day of September, 1980.

S/
HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

C. JUDGMENT OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS:

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

ABILENE DIVISION

JAMES GRIFFIN,	§	
Plaintiff,	§	
V.	§	CIVIL ACTION NO. CA-1-79-29
BIG SPRING INDEPENDENT SCHOOL DISTRICT, et al.	§	
Defendants	§	

JUDGMENT

This action came on for hearing before the Court, the undersigned Judge presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff, James Griffin, take nothing, that the action be dismissed on the merits, and that the defendants, Big Spring Independent School District, Emmett McKenzie, Jim W. Little, Delno Poss, Roy Watkins, Al Valdes, Delbert Donelson, Don Reynold, Bobby Fuller, Carol

Hunter, John Smith, and Don Robbins, recover of plaintiff their costs of action and judgment is here entered for the defendants.

ENTERED this 8th day of September, 1980.

S/
HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

APPENDIX C

Order of the Texas State Board of Education:

DOCKET NO. 77-R-79

JAMES E. GRIFFIN — BEFORE THE STATE BOARD OF EDUCATION

V.

BIG SPRING INDEPENDENT SCHOOL DISTRICT — THE STATE OF TEXAS

ORDER OF THE STATE BOARD OF EDUCATION

On the 13th day of January, 1975, came on to be heard the appeal of the Big Spring Independent School District, hereinafter called "District", complaining of the decision of the Commissioner of Education of the State of Texas in the above styled and numbered cause, wherein the Petitioner is James E. Griffin, hereinafter called "Griffin".

After due consideration of the evidence, the record made before the Commissioner of Education, all other matters of record, and the briefs filed herein, and based on the evidence contained in the Statement of Facts and the written documents made a part of the record, the State Board of Education makes the following Finding of Fact:

1. Griffin, a black male, was employed as a teacher and coach by the District from August, 1973, to May 27, 1977, under one year term contracts. Specifically, from August 2, 1976, to May 27, 1977, Griffin was employed as a teacher and as head basketball coach by the District under a one year term contract, which expired by its own terms. Griffin was not offered a new contract by the District.

2. The decision of the Board of Trustees of the District not to offer Griffin a new contract was based upon the recommendation of Superintendent McKenzie, and Griffin's race was not considered in reaching such Board decision, as demonstrated partly by the fact that a black person was hired to fill the coaching vacancy created in the District when Griffin was not offered a new contract.

3. The recommendation by Superintendent McKenzie that Griffin not be offered a new contract was based upon recommendation of Principle Smith, Assistant Principal Martin, and Athletic Director Robbins, as set forth in

Principal Smith's letter of recommendation dated May 6, 1977. This recommendation by Superintendent McKenzie was not in any way based upon Griffin's race.

4. The decision of Principal Smith not to recommend Griffin was not based on Mr. Griffin's race, but was based on personal observations, and the recommendations of Assistant Principal Martin and Athletic Director Robbins. In reaching his decision Principal Smith laid the heaviest emphasis upon the academic recommendation made by Assistant Principal Martin.

5. Even if the recommendation made by Athletic Director Robbins was influenced by his private racial considerations, same was immaterial in that his recommendation related to the position of Griffin on the coaching staff, and not Griffin's position as a teacher, and further, no mention of race was made by Robbins in his recommendation. As Griffin was both a teacher and a coach, it would have been necessary that he also receive a favorable re-

commendation as to his teaching ability in order to be offered a new contract.

6. Assistant Principal Martin recommended that the District not offer Griffin a new contract because of unexcused absences from the classroom and from duty stations, because of an unwillingness by Griffin to cooperate with Martin, and because Griffin told Martin (his supervisor) that it was none of his (Martin's) damn business how he (Griffin) administered a test.

7. The recommendation of Athletic Director Robbins that Griffin not be offered a new contract was based upon the refusal of Griffin to perform assigned duties, including the failure of Griffin to properly establish and supervise a Junior High basketball program, together with a failure by Griffin to cooperate with Athletic Director Robbins.

8. Griffin did not timely provide the District with a "Notice of Intent to Appeal" or a "Petition for Review," as required by the procedures on Hearings and Appeals of the

Texas Education Agency.

CONCLUSION

The nonrenewal of Petitioner's employment contract was not the result of impermissible racial discrimination on the part of the Big Spring Independent School District.

It is therefore Ordered that the decision of the Commissioner of Education be, and is hereby, in all things reversed, that the appeal be, and is hereby, in all things granted and that all relief sought by Griffin be, and is hereby, denied.

SIGNED and ENTERED this 13th day of January, 1979.

S/
JOE KELLY BUTLER, CHAIRMAN
STATE BOARD OF EDUCATION

ATTEST:

S/
PAUL MATHEWS, SECRETARY
STATE BOARD OF EDUCATION

APPENDIX D

Notice of Appeals:

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

ABILENE DIVISION

JAMES E. GRIFFIN	§
Plaintiff,	§
VS.	§
BIG SPRING INDEPENDENT SCHOOL DISTRICT, EMMETT McKENZIE, JIM W. LITTLE, DELNOR POSS, ROY WATKINS, AL VALDEZ, DELBERT DONELSON, DON REYNOLDS, CAROL HUNTER, JOHN SMITH and DON ROBBINS,	§
Defendants.	§

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Notice is hereby given that James E. Griffin, the Plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on September 8, 1980.

Dated October 2, 1980

Respectfully submitted,

BOB HALL & ASSOCIATES

BY S/
Truman W. Dean, Jr.

ATTORNEYS FOR PLAINTIFF

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